

***Advisory Action
Before the Filing of an Appeal Brief***

Application No.

10/624,191

Applicant(s)

MICKLASH ET AL.

Examiner

NATALIA LEVKOVICH

Art Unit

1797

–The MAILING DATE of this communication appears on the cover sheet with the correspondence address –

THE REPLY FILED 11 March 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
 Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 11 March 2008. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: NONE

Claim(s) objected to: NONE

Claim(s) rejected: 85-93

Claim(s) withdrawn from consideration: 1-8,10-14,16-29,31-33,35,37-39 and 72-83

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: Applicant's arguments filed 03/11/2008, have been fully considered but they are not persuasive.

Applicant traverses the restriction requirement presented in the 09/11/2007 Office Action on the grounds that the original restriction requirement was 'recharacterized', and that 'the office action does not even attempt to point out why the inventions are separate and distinct'.

Examiner strongly disagrees. The restriction requirement was presented in response to the amendments filed by Applicant on 05/04/2007, which deleted a number of previously claimed elements, or replaced them with new and patentably distinct ones. For example, the top lid protrusions disposed on a surface that engages the reaction block, were deleted from the independent claim 1, as well as the top and bottom gaskets; the top lid hinge a latch components, as well as the band, were added; the continuous recessed region was replaced by the recessed regions disposed on at least two sides. Such removal of the elements, combined with adding different ones, shifts the originally claimed invention (Species I) to its patentably distinct modification (Species II) having a different structure, as was pointed out in the 09/11/2007 Office Action.

Applicant further argues that 'it would not be possible to prove a serious burden' because the added elements were originally contained in some of the dependent claims. Examiner notes that such reshuffling of limitations from the dependent claims, combined with deleting previously presented limitations from the independent claims, leads to new and patentably distinct combinations, or species, examination of which does impose an additional and undue burden on the Examiner, since it requires a new search strategy, logic and reasoning.

Applicant requests the finality of the rejection being withdrawn on the grounds that 'Applicants have not received from the Office a substantive response to their previous amendment. Examiner disagrees. The 09/11/2007 Office Action addresses all the limitations and Applicant's arguments pertaining to the pending claims 85-93, based on the prior art which had been previously